United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-1187

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OJI KWESI SEKOU a/k/a CHRIS REED,
JAJA NKOMO KALOMO a/k/a MICHAEL PHILLIPS,

Appellants,

-against-

ROBERT J. HENDERSON, Superintendent of the Auburn Correctional Facility, Officer.

Appellees.

Doc. No. 73-CV-543

C/A Ref No. T-3018

MAR 5 1974

[redacted]

BRIEF FOR APPELLANTS

and Appendix

In Pro-se

Oji Kwesi Sekou a/k/a
Chris Reed
No. 64410
135 State Street
Auburn, New York. 13021

Jaja Nkomo Kalomo a/k/a
Michael Phillips
No. 64409
135 State Street
Auburn, New York. 13021

MEMORANDUM

Appellants, on the 20 day of November, 1973, Filed a civil rights complaint before the United States District Court for the Northern District of New York, sueing the Appellees for the deprivation of Appellants fundamental Constitutional Rights under the First Amendment, Free exercise, Eighth Amendment to embrace the Fourteenth Amendment, Due Process and Personal Liberty to the United States Constitution.

Appellants sought a preliminary and permanent injunction, enjoining the appellees from pumishing appellants for the

wearing of beard and goatee, together with a declaratory judgment declaring institutional Custom's, Rules and Regulation prohibiting beard and goatee as unconstitutional on its face. Appellants seeks exemplary damages of Four-Thousand ($ 4,000.00) Dollars.

Appellants complaint was denied and dismissed by the Hon. Edmund Port, United States District Judge, for the Northern District of New York. Appellants complaint was dismissed without an hearing on the 4 day of December,1973; granting the appellants to proceed in forma pauperis. Appellants thereby appealed and do submits this brief in support.

An opinion was given by the Hon. Edmund Port, as follows;

" The Claim presented does not, in my opinion, present a federal or constitutional question justifying federal interference in the operation of the State prison. See Blake v. Pryse, 444 F.2d 218 (8th Cir. 1971), and Williams v. Batton, 342 F.Supp. 1110 (E.D.N.C. 1972). Further, Chief Judge James T. Foley of this District Court has recently reached the same decision in a case questioning a prison regulation requiring an inmate to shave and cut his hair. Barnes v. Preiser, et al, 73-CV- (N.D.N.Y. Nov. 29, 1973)

For the reason herein, it is
ORDERED, THAT the complaint herein be and the same hereby is denied and dismissed."

ACTUAL FACTS

Appellants are inmates at the Auburn Correctional Facility who are housed in the Box,(Special Housing Unit). Appellants have been housed in the Box (Special Housing Unit), since the Month of December 29, day of 1972, for the sole reason that appellants have been charged in an indictment for the allege crimes, which stems from the Attica Prison Revoke of September 9-13,1971.

Appellants are pre-trial detainees as well as persons serving sentences, awaiting in the Box (Special Housing Unit) for the commencement of trial for the aforesaid indictments.

STATEMENTS OF FACTS

At the filing of appellants complaint, prior to the dismissal. Appellees nor traverse or responded to the complaint, or made any attempt to show such denial of the appellants fundamental constitutional rights and nature rights, were perpetrated in compelling interest of the State, or that the exercise of personal liberties by the appellants would jeopardaize the safety and maintainace of the prison, or produce a hazard to the wealth-fare and health of the inmates.

Appellants were inmates at the Attica Correctional Facility and housed in the general population. On the date of December 29, 1972, appellants were named in two sperate indictments, chargeing very grave criminal crimes which allegedly occured during the Attica prison revoke of September 9-13, 1971. On the date of December 29, 1972, both appellants were taken to Warsaw Courthouse in the County of Wyoming New York, to be arraign on the aforesaid indictments.

The County Jail at Warsaw New York, was said to have inadequate facilities, thus, appellants were remand to the department of Correction, and by who appellants were taken to the Auburn Correctional Facility and placed in punitive segregation. See People v. Hill, 345 N.Y.S. 2d 237(1973).

Appellants to this day are housed in the Box, punitive segregation, called by the custos' as the Special Housing Unit, and called by the inmates as the Box,(hereafter referred to as the Box).

Appellants being housed in the Box, they never come in contact with the Facilitys general population. Appellants are confined to a cell varying from 22 to 24 hours per day.

The only departure from the Box by appellants are to appear in court for the aforesaid indictments, or to go on visits and the dentist within the prison. At no time do appellants come in contact with the general population of the Auburn Correctional Facility, as appellants are not allowed to associate with members outside of their class, those who are also indicted for allege acts which are said to occur during the Attica revoke.

CONTENTION

Appellants being housed in the Box for the purpose of being named in an indictment, contend that they are trial prisoners and as pre-trial detainees, they are entitled to the same liberty and rights as pre-trial detainee not in the custody of the State department of Correction.

NOTE

" Appellants are charged in class indictments, and most of appellants codefendants are released on parole and bail, not being in the custody of the department of correction but at liberty in society. Appellants and their codefendants will appear in Court and at trial together, in-light of free exercise of personal liberty, appellants codefendants could and some do, appear in Court with beard and goatee. Does their appearance into Court during the time of trial in an un-uniform fashion, (meaning the custom of prison presentment) prejudice the Jury towards the regimentated image that appellants are being forced to adhere in appearance."

The appellees for the Months of December 1972-April of 1973, being aware that appellants are making Court appearances and did allow appellants to wear beards and goatees without any form of reprisals. Out of an argument between a member of appellants class and a staff memebr of appellees' by name of Lieutenant Howard Kellso, which stemmed from the continuous

harassment perpetrated against appellants' and there class. The Lieutenant Kellso angrily ordered that appellants and those of his class discontinue wearing beards and goatees, and to shave from their person's any growth of beard and goatee.

Appellants being allowed to wear beards and goatees for the Months of December 1972- April 1973, acknowledge the Lieuteant Kellso order as an reprisal for making protest to the treatment and conditions. Thus, appellant Jaja Nkomo Kalomo was threating to be confined if he did not shave from his person, beard and goatee. Appellant Jaja Nkomo Kalomo did remove from his person beard and goatee and was confined to 24 hour lockin for a period of three days and then released.

Appellant Oji Kwesi Sekou, was ordered to shave and did not do so, appellant herein was taken to a disciplinary hearheaded by the Lieuteant Kellso. Appellant herein, explained to the Lieuteant Kellso, that appellant was/is a pre-trial detainee, and do appear in Court and further read the case law of Seal v. Manson, to the Lieuteant Kellso. Lieuteant Kellso refused to consider appellant's issue and placed appellant to cell confinement of 24 hours for over two weeks and 23 hours cell confinement for over a week.

Appellants in the Month of July, returned from Court and was allowed to wear beards and goatees for over two weeks, and than ordered to shave.

At no time did the wearing of beards and goatees by appellants interferred with the functions of the prison or security thereof.

ISSUE PRESENT

1. Whether the United States Court of Appeal for the Second Circuit should intervene in the controversy between appellants and appellees, involving appellants Constitutional Rights as a pre-trial detainee.

2. Whether appellants as convicted persons has a right to exercise personal liberties and are to suffer additional as to whats enjoined upon them by law

3. Whether appellants are entitled to exemplary damages as convicted persons and pre-trial detainees.

ARGUEMENT

1. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD INTERVENE IN THE CONTROVERSY INVOLVING THE VIOLATIONS OF APPELLANTS CONSTITUTIONAL PROYECTED RIGHTS.

As noted, appellants are convicted persons. Upon their indictment of December 29, 1972, they became pre-trial detainees and are entitled to the priviledges as that of an pre-trial prisoner.

As pre-trial detainees, not able to receive bail because of post conviction. Appellants are in every sense, situated as the predicament of that of Seal v. Manson, here we have appellants facing criminal trial, without bail, and are being denied by the appellees tc appear in Court in the manner appellants choose.

In Seal v. Manson, 326 F. Supp. 1375 (Conn. 1971), District Judge Zampano noted the Constitutional right of persons incarcerated facing criminal trial to wear beard and goatee, in these words;

> " In civil Rights action by persons, who were held without bond while on trial on criminal charges in State Court, as to rights of one such person to wear beard and goatee was of constitutional dimension, in view of the fact that rights of individuals to wear certain head and facial hair style constitute personal liberty protected under Fourteenth Amendment."

Appellants as pre-trial detainees facing trial on criminal charges has a right to wear beard and goatee, Seal, Supra, and to choose the manner in which they wish to appear in Court, and that such restrictions imposed upon them are unreasonable by appellees and unconstitutional without due process of law. In Wallace v. Ford, 346 F.Supp. 156 (D.C.Ark. 1972), the Court noted:

> " Right retained by the people include freedom to govern one's personal appearance, and such right command due process protection."

As pre-trial detainees, appellants heve the right to wear beard and goatee, Smith v. Sampson, 349 F.Supp. 268 (D.C.N.H. 1972), the right to grow beard or wear is an aspect of persona l liberty and is protected from State infrigement, Farrell v. Smith, 310 F.Supp. 732 (D.C.Me. 1970), Carter v. Hodges, 317 F.Supp. 89 (D.C.Ark. 1970), such right can not be interferred with on basis of rules. In Rocha v. Beto, 449 F.2d. 741 (C.A.Tex. 1971), noted:

> " Interference with Federal guaranteed rights may not be insulated on basis that every thing which occurs within prison wall is protected as prison administration."

F Further, there is no showing that compelling legitimate State interest are involved to attempt to justify the deprivation of appellants constitutional rights, See Richard v. Thurston, 424 F.2d 1281 (1970), Briscoe v. Kusper, 435 F.2d 1046 (C.A.Mass. 1970), Ruffin v. Housing Authority of New Orlean, 301 F.Supp. 251 (D.C.La. 1969), and that prisoners do retain all rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law, More v. Ciccone, 459 F.2d 574 (C.A. Mo. 1972).

In Collin v. Schoonfiled, 344 F.Supp. 257 (D.C.Md. 1972), a suit was brought by pre-trial detainees in the Baltimore city jail against the warden and other prison officials. Judge Kaufman discussed the standards of due process applicable to pre-trial detainees in the words:

> " There are certain minimum standards below which today's society cannot sink in its treatment of those of its members who must, for one reason or another, be confined in jails and prisons. Those minimum standards must be read within the constitutional setting of 1972, not that of 1789..." at 264.

11. APPELLANTS AS CONVICTED PERSONS HAS A RIGHT TO PERSONAL LIBERTY, AND THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD INTERVENE IN THE CONTROVERSY BETWEEN APPELLANTS AND APPELLEES, INVOLVING THE ADDITIONAL SUFFERANCE IMPOSED UPON APPELLANTS BY APPELLEES WITHOUT DUE PROCESS OF LAW.

Appellants being convicted, retain all rights of an ordinary citizen, except those expressly or by necessary implication taken from them, Coffin v. Reichard, 143 F.2d 443,445 (6th Cir. 1944),Cert denied, 355 U.S. 887 (1945), More v. Ciccone, 459 F.2d 574 (C.A.Mo. 1972), among rights retained by people under constitution form of government is freedom to government is freedom to govern one's personal appearance and commands protection of Fourteenth Amendment due process Clause, Bishop v. Colaw, 450 F.2d 1069 (C.A.Mo. 1971).

The right for one to grow beard and goatee, is the right for one to govern one's personal appearance and to choose how one wish to appear, See Smith v. Sampson, 349 F.Supp. 268 (D.C.N.H. 1972), which are aspect's of personal liberty protected by the due process Clause of the Fourteenth Amendment, Carter v. Hodges, 317 F. Supp. 732 (D.C.Ark. 1970),

Farrell v. Smith, 310 F. Supp. 732 (D.C.Me. 1970), Seal v. Manson, 326 F.Supp. 1375 (Conn. 1971), Parker v. Fry, 323 F. Supp. 728 (D.C.Ark. 1970) , and from State infringment, Farrell v. Smith, 310 F. Supp. 732 (D.C.Me. 1970).

As noted in March, 1971 Criminal Law Bulletin, Volume Number 2,:

> " The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attemp to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guaradian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seen good to themselves." at 103.

The deprivation of personal liberty can not be imposed where there are no compelling interest of the State, See Richard v. Thurston, 424 F.2d 1281 (C.A.Mass. 1970), Briscone v. Kusper, 435 F.2d 1046 (C.A.III. 1970).

The mere fact of appellants conviction, does not deprive them of rights guaranteed under the constitution, Washinton Post Co. v. Kleindienst , 357 F. Supp. 770 (D.C.D.C. 1972).

Personal liberty is protected under the constitution of the United States, as stated in, City of Birmingham v. Monk, 185 F.2d 859, Cert denied, 341 U.S. 940 (C.A.Ala. 1951):

> " Right establish and guaranteed individual by first section of the Fourteenth Amendment are personal rights."

Personal rights are that of personal liberty, guaranteed by the constitution Fourteenth Amendment and protected from State infringment by due process clause of the Fourteenth Amendment to the United States Constitution, Farrell v. Smith, 310 F. Supp. 732 (D.C.Me. 1970). As convicted persons, appellants are not by law deprived of their rights to exercise personal liberty, ony the rights that are expressly or by necessary implication. Which are freedom to be at large in society, restricted by implicated incarceration, See Coffin v. Reichard,143 F.2d 443,445 (6th Cir. 1944), Cert denied, 355 U.S. 887 (1945), More v. Ciccone, 459 F.2d 574 (C.A.Mo. 1972).

Personal liberty are inheritance of Nature, and are guaranteed protection to all citizens by the due process Clause of Fourteenth Amendment to the United States Constitution, and "Federal Courts should recognize such

substantive constitutional rights inhering in liberty assurance of due process clause of the Fourteenth Amendment only where fundamental individual liberties are at stake." (Per, Morgan, Circuit Judge, with six Circuit Judges concurring and one Circuit Judge Special concurring.) Karr v. Schmidt, 460 F.2d 609, Cert denied, 409 U.S. 989 (C.A.Tex. 1972)

As noted by the Court in, Faulkner v. Clifford, 289 F Supp. 895 (D.C.N.Y. 1968)

> " Rights guaranteed to individual by one clause of the constitution may not be ov erridden by power exercised under another part of that constitution."

Appellants as convicted persons retains all other constitutional rights, except those of social castration, by the implication of conviction and incarceration, More v. Ciccone, 459 F.2d 574 (C.A.Mo. 1972), otherwise they are entitled to the rights of ordinary citizens and Federal Courts must not be reluctant in interferring to protect prisoners constitutional rights, Melton v. Young, 328 F. Supp. 88, Affired, 465 F.2d 1332 (D.C.Tenn. 1971), Rocha v. Beto, 449 F.2d 741 (C.A.Tex. 1971), Martinez v. Mancusi, 443 F.2d 921, Cert denied, 401 U.S. 983 (C.A.N.Y. 1971),

Collins v. Schoonfield, 344 F. Supp. 257 (D.C.Md. 1972), Lathrop v. Brewer, 340 F.Supp. 873 (D.C.Iowa. 1972)

As states in, Wright v. McMann, 321 F.Supp. 127 (N.D. N.Y. 1970);

> " No longer can prisons and there immates be considered a closed society with every internal disciplinary judgment to be blissfully regared as immune from the limelight that all public agencies ordinarily are subjected to." at 132. also see, Rocha v. Beto 449 F.2d 741 (C.A.Tex. 1971).

The constitutional rights of prisoner are protected, Ross v. Blackledge, 477 F.2d 616 (C.A.N.C. 1973), and no longer are prisoner regared as a slave of the State, Gilmore v. Lynch, 319 F.Supp. at 1o8 (1973).

The right to grow beard and goatee is an aspect of personal liberty, and the provision for protection of liberty should be liberally construed in favor of citizen. U.S. ex-rel Flannery v. Commanding General, Second Service Command, 69 F. Supp. 61 (D.C.N.Y. 1947), the guaranteed rights of the Fourteenth Amendment are personal one's, City of Birmingham v. Monk, 185 F.2d 895, Cert denied, 341 U.S. 940 (C.A.Ala. 1951).

111. THE APPELLANTS ARE ENTITLED TO DAMAGED AGAINST THE APPELLEES.

In, Landman v. Royster, 354 F. Supp. 1302 (1173), the Court said:

> " Official is not liable for the acts of his subordinates in absence of some personal involvement in those acts on the part of the party to be charged. The requirement of personal involvement is met, however, not when the superior personally directs his subordinates to do acts but also when he has knowledge of their acts and acquiesce in them."

The appellee, Superintendent Robert J. Henderson, is aware of the actions of his subordinates, and of the custom's enforced by them and forther, the appellee Henderson, condones such confiement for the disobeisance,noncompliance of appellants in adhering to the unconstitutional shaven custom.

The following is a quote from a Statement to the Rochester, N.Y. Democcat and Chronicle, news paper, made by the appellee Henderson:

> " Johnson has been denied exercise in the yard, where there's a television set, cards and some space, and is allowed only'section rec' in the 12-foot corridor outside his section because for seven months he refused to shave his beard off." Dated: October 29, 1973, at page 6B.

The aforesaid Johnson, is a member of appellants' class, who was released on parole in the month of December 1973, and is a codefendant of appellant Oji Awesi Sekou.

As to acts complained of, because of appellee Superintendent Henderson has actual knowledge. Appellants should be awarded exemplary damages.

In this connection, the Court in Landman, Supra, awared damages for pain and suffering.

Appellees' are liable as a result of denying appellants their Constitutional protected rights, Monroe v. Pape, 365 U.S. 167 (1961). Appellants acts were not perpetrated in the interest of the State or for good cause, United States ex-rel. Motley v. Rundle, 340 F. Supp. 807 (E.D.Pa. 1972), as the deprivations of appellants fundamental Constitutional rights without due process of law has not only cause personal lost, as appellants being stripped of pride and the expression of heritage and culture as Black Men, but they have suffered unwanting mental anguish due to the unconstitutional emasculation of their personal rights, perpetrated by appellees. See, Braxton v. Board of Public Instruction of Duval County, Fla., 303 F. Supp. 958 (D.C.Fla. 1969).

Heretofore, Judgment against the appellees should be entered as for such relief prayed for in complaint.

RESPECTFULLY SUBMITTED,

/s/ Oji Kwesi Sekou

Oji Kwesi Sekou a/k/a Chris Reed
No. 64410
135 State Street
Auburn, New York. 13021

In Pro-se

/s/ Jaja Nkomo Kalomo

Jaja Nkomo Kalomo a/k/a Michael Phillips
No. 64409
135 State Street
Auburn, New York. 13021

In Pro-se

Dated: February 8, 1974

Sworn to before me this
8th day of February, 1974
Elaine A. Graves

ELAINE A. GRAVES
Notary Public, State of New York
Cayuga County #1436
My Commission Expires March 30, 19 75

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OJI KWESI SEKOU, etc. et al,

Appellants,

-v-

ROBERT J. HENDERSON, Supt. et al,

Appellees.

PROOF OF SERVICE

Doc. No. 73-CV-543

C/A Ref. No. T-3018

In Pro-se

OJI KWESI SEKOU a/k/a CHRIS REED, and JAJA NKOMO KALOMO a/k/a MICHAEL PHILLIPS, being duly sworn, deposes and says;

That on the 8th day of February, 1974, they placed in the hands of the Notary Public for the Auburn Correctional Facility, Five (5) copies of the annexed brief for appellants, to be verified and delivered to the United States Court of Appeals for the Second Circuit by the U.S. Mail, to Mr. A. Daniel Fusaro, Clerk. And there, be distribute in accordance to Law.

In addition, Two (2) copies of the aforesaid brief to be verified with a carbon copy of this proof of service, which shall remain in the possession of the Appellants as proof hereof.

CONTENTS OF PAPERS

1) The Original of the Brief, and

2) Six (6) xerox copies of the brief.

RESPECTFULLY SUBMITTED,

/s/ Oji Kwesi Sekou

OJI KWESI SEKOU a/k/a CHRIS REED #64410

/s/ Jaja Nkomo Kalomo

JAJA NKOMO KALOMO a/k/a MICHAEL PHILLIPS
No. 64409

Addresses:
135 State Street
Auburn, New York. 13021

SWORN TO ON THE
8th DAY OF FEBRUARY, 1974.

Elaine A. Graves

NOTARY PUBLIC

ELAINE A. GRAVES
Notary Public, State of New York
Cayuga County #1436
My Commission Expires March 30, 19 75

5

73-C[illegible]-

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
OJI KWESI SEKOU a/k/a CHRIS REED, JAJA NKOMO KALOMO a/k/a MICHAEL PHILLIPS, Plaintiffs -against- ROBERT J. HENDERSON, Superintendent of the Auburn Correctional Facility, Officer I-10, Defendants	For plaintiff: For defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	
J.S. 5 mailed	Clerk					
J.S. 6 mailed	Marshal					
Basis of Action: civil rights	Docket fee					
	Witness fees					
Action arose at:	Depositions					

73-CV- 513

DATE 1973	PROCEEDINGS	Date Order Judgment
Dec. 6	(1) Filed civil rights complaint	
" 6	(2) " Memorandum-Decision and Order denying and dismissing complaint.since cl presented does not present a federal or constitutional question justifying fe interference in operation of State Prisons. Leave to proceed in forma pauper is granted, and Clerk is directed to file papers without payment of fees-HON. E. PORT, USDJ	
" 6	(3) Filed Judgment	
1974 17	(4) " Notice of Appeal-copies sent to Clerk, USCA and Atty General,State of NY	
Jan. 30	(5) " copies of correspondence from Petitioner to Judge, Clerk of U.S.C.A. to Petitioner and Judge to Petitioner	
Feb. 19	(6) Filed "Application for Withdrawal of Application for assignment of counsel with Judge Port's Order endorsed on cover denying request w/o prejudice to a further application to Court of Appeals, motion for withdrawal of applicati is dismissed as moot-HON. E. PORT, USDJ	

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

OJI KWESI SEKOU a/k/a CHRIS REED,
JAJA NKOMO KALOMO a/k/a MICHAEL
PHILLIPS,

Plaintiffs,

-Against- 73-CV-

ROBERT J. HENDERSON, Superintendent
of the Auburn Correctional Facility.
Officer I-IO,

Defendants.

EDMUND PORT, Judge

Memorandum-Decision and Order

The Clerk of the court has sent to me for my consideration a civil rights complaint together with an affidavit in forma pauperis from state inmates presently confined in the Auburn Correctional Facility, Auburn, New York.

The chief complaint made is that the plaintiffs are being administratively punished for wearing beards or goatees. Injunctive relief is sought enjoining the defendants from punishing plaintiffs for the wearing of a beard or goatee, together with declaratory relief declaring institutional rules prohibiting beards and goatees as unconstitutional. Plaintiffs also seek exemplary damages of $4,000.00.

The claim presented does not, in my opinion, present a

federal or constitutional question justifying federal interference in the operation of the State prisons. See Blake v. Pryse, 444 F.2d 218 (8th Cir. 1971), and Williams v. Batton, 342 F.Supp. 1110 (E.D.N.C. 1972). Further, Chief Judge James T. Foley of this District Court has recently reached the same decision in a case questioning a prison regulation requiring an inmate to shave and cut his hair. Barnes v. Preiser, et al., 73-CV- (N.D.N.Y. Nov. 29, 1973.)

For the reasons herein, it is

ORDERED, that the complaint herein be and the same hereby is denied and dismissed. Leave to proceed in forma pauperis is granted, and the Clerk is directed to file the papers herein without the payment of fees.

Edmund Port
United States District Judge

Dated: Auburn, New York.
December 4, 1973.